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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SIDONIO CRUZ-SANTOS and AGUSTIN
ZEPEDA-ONOFRE,

Defendants and Appellants.

A139860

(Sonoma County
Super. Ct. No. SCR609525)

A jury found defendants Sidonio Cruz-Santos and Agustin Zepeda-Onofre guilty of the second degree murder (Pen. Code, § 187¹) of Gabino Lopez-Santiago (Gabino), unlawful cultivation of marijuana (Health & Saf. Code, § 11358), and three counts of assault with a firearm (§ 245, subd. (a)(2)). Cruz-Santos was also found guilty of threatening a person in an attempt to dissuade that person from testifying (§ 136.1, subd. (c)(1)). The jury further found true a number of firearm-related enhancement allegations. The trial court imposed aggregate state prison terms of 42 years and 8 months to life for Cruz-Santos, and 25-years to life for Zepeda-Onofre.

Cruz-Santos contends: (1) the testimony of an accomplice—whom the jury should have been instructed was an accomplice as a matter of law—was insufficiently corroborated; (2) the trial court erred in excluding evidence that pointed to the culpability of an unnamed third party; (3) the trial court misinstructed the jury on the issues of

¹Statutory references are to the Penal Code unless otherwise indicated.

accomplice credibility and third party culpability; and (4) the trial court erred in not staying the cultivation and one of the assault counts, as required by section 654. The primary contention of both Cruz-Santos and Zepeda-Onofre is that the jury was misinstructed with an erroneous legal theory, namely, that the murder could be the natural and probable consequence of illegal marijuana cultivation or a conspiracy to illegally cultivate marijuana. During the pendency of these appeals, our Supreme Court decided *People v. Smith* (2014) 60 Cal.4th 603 (*Smith*), which, in supplemental briefing, Cruz-Santos and Zepeda-Onofre claim as new and decisive support for their last argument. We conclude that no prejudicial error has been established, and thus we affirm the judgments of conviction.

BACKGROUND

We review the trial record in the light most favorable to the prosecution and in support of the judgments. (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639.) In any event, much of the salient details are not in material dispute.

In October 2011, Ramon Lopez-Velasco spent several days as a casual laborer working at a location on Chemise Road outside Healdsburg. Lopez-Velasco was hired by Cruz-Santos, and worked alongside Zepeda-Onofre cultivating marijuana plants and putting marijuana in bags for transportation “to the place where they kept more marijuana.” Lopez-Velasco was told by Cruz-Santos that the marijuana was “medical.”

Lopez-Velasco soon realized that firearms were a constant presence. Zepeda-Onofre was wearing a handgun when he first met Lopez-Velasco, and Cruz-Santos told Zepeda-Onofre to get a gun for Lopez-Velasco. Zepeda-Onofre did so, and showed Lopez-Velasco how to load the weapon. Cruz-Santos told Lopez-Velasco “to carry that gun with me in case of an emergency. If something were to happen during the nighttime because . . . there are wild animals and there are people whose objective is to steal the harvest.” Cruz-Santos brought Lopez-Velasco to the site at night because, as Zepeda-Onofre told him, “it was better to travel at night so that nobody saw us.” With Zepeda-

Onofre, Lopez-Velasco stayed overnight at the site, the handgun by his side. Cruz-Santos and Zepeda-Onofre were usually armed.² Lopez-Velasco also saw a pair of rifles.

On Friday, Lopez-Velasco told Cruz-Santos that he (Lopez-Velasco) would be returning to his regular job on Monday. As the afternoon was ending, Cruz-Santos, Zepeda-Onofre, and Lopez-Velasco were joined at the Chemise Road site by three men—Conrado Cruz (Conrado), Gabino (who was Lopez-Velasco’s brother-in-law), and a man named “Angel.”³ Food, beer, and cocaine were consumed.⁴ At one point Cruz-Santos became so irritated at someone riding an all-terrain vehicle nearby that he ordered Zepeda-Onofre “to shoot the gun” “to frighten those assholes . . . so that they would leave” “and stay way [*sic*] from the place.” Zepeda-Onofre dutifully fired a single shot. Everyone was drinking. Later, angry words began to be exchanged between Conrado and Gabino. Things became so heated that Cruz-Santos drew his gun and told the pair: “If you have problems in your house then go fix them in your house. But don’t come here and give me problems. Because the devil is touching me and I can be capable of anything.” These words made Conrado afraid and receptive to Lopez-Velasco’s urging that they should leave. Conrado and Gabino were sufficiently “drunk they [had] a difficult time walking properly.” Cruz-Santos and Zepeda-Onofre were “not totally” intoxicated. Conrado was also disoriented, and had previously “lost consciousness.”

Lopez-Velasco testified that Conrado started to walk away, but not toward the “only one way” to exit the site. With gun in hand, Cruz-Santos blocked his way “telling him that was the wrong way to take.” But Conrado “was stubborn,” saying “that that was the way he had originally come from.” Cruz-Santos “kept on insisting that wasn’t the

²According to a neighbor who was also growing marijuana, “Ramon” was present at a conversation between the neighbor and Cruz-Santos sometime in mid-October. During the conversation, Cruz-Santos was holding a rifle, and fingering “part of a packaging with three or four bullets in it” while expressing fear of being robbed.

³An olive grower testified that Conrado “was a laborer who worked for me on and off for several years,” and sometimes brought Gabino “if he [Conrado] needed additional assistance with the job.”

⁴The blood taken from Cruz-Santos and Zepeda-Onofre shortly after the murder tested positive for cocaine; Lopez-Velasco’s blood did not.

way that he had originally come from.” After a few minutes of this, Lopez-Velasco—who described himself as “the only person . . . there in his five senses”—led the stumbling Conrado and Gabino out of what they called “the garden” and towards the driveway off the property. Cruz-Santos and Zepeda-Onofre followed them.

According to Lopez-Velasco, when the group reached the driveway, “Mr. Conrado explained to me that he was very drunk . . . that he wasn’t able to drive. He gave me his keys in order to go get his truck from where it had been . . . parked.” As Lopez-Velasco started to retrieve Conrado’s truck, he heard Cruz-Santos and Zepeda-Onofre “walking towards the driveway where we were standing,” and then saw them standing next to a car parked on the driveway, which was near to where Lopez-Velasco had left Conrado and Gabino. About two minutes later, Lopez-Velasco heard three or four gunshots, but he continued walking to get Conrado’s truck.

Lopez-Velasco explained what then happened: “When I came back with the truck . . . I was able to see that . . . Mr. Sidonio [Cruz-Santos] had Conrado on the ground with the gun to his head.” [¶] . . . [¶] “I stopped the truck as fast as I could, and I ran towards where Mr. Sidonio was, grabbing Mr. Conrado.” [¶] . . . [¶] “When I was getting closer to them I could listen to what he was saying, not to say anything of what Conrado had seen, because he was capable of finding him or his family and kill them.” Lopez-Velasco pushed Cruz-Santos off Conrado. Cruz-Santos “put the gun twice, one in the head and on my chest.” Lopez-Velasco asked Cruz-Santos “where Gabino was.” Cruz-Santos replied “Gabino had gone to hell.” When Lopez-Velasco asked “why?”, Cruz-Santos answered “because I want[ed] to.” Spotting “a lot of blood” on the driveway, Lopez-Velasco again asked “where Gabino was,” and Cruz-Santos told Zepeda-Onofre to “show [him] where Gabino was.”

Zepeda-Onofre appeared with a gun in his hand—“the same gun that they were carrying that same day.” [¶] . . . [¶] “With his right hand he was holding the gun, and with his left hand he was indicating where he wanted me to walk to.” After walking a short distance, Zepeda-Onofre told Lopez-Velasco to “look down.” [¶] . . . [¶] “It was Gabino’s body.” At this point, “Sidonio [Cruz-Santos] with weapon in hand ordered Mr.

Conrado that he help me get the body out of there.” Cruz-Santos actually said: “get that garbage out of there [¶] . . . [¶] to tear him apart or to bury him, but he didn’t want to know anything of what . . . happened. And if I said something or if I whispered something, that he was going to find me here or in Mexico and my family to do the same to me. I asked him why he had done it.” Cruz-Santos’s response: “Just because he wanted [to do] it.”

While Cruz-Santos and Zepeda-Onofre “were pointing at me with the gun,” Lopez-Velasco and Conrado managed to get Gabino’s body into the truck. Conrado refused to get into the truck with Lopez-Velasco, at which point, “[w]hen I realized that he didn’t want to get in the truck I ran towards the driver’s seat . . . to get out of there as fast . . . as I could.” Lopez-Velasco drove for about an hour, dumped the body by the road, and then notified Healdsburg police. The version Lopez-Velasco provided to police had significant lies and omissions.

Lopez-Velasco further testified that he did not see either Conrado or Gabino with a gun that night.

Following the initial interview with Lopez-Velasco, in which he told police he thought Conrado might also be dead, officers immediately went to Conrado’s home, where they found him unhurt but generally nervous. Conrado voluntarily went with the officers to a police station “to be asked more questions about why Gabino wasn’t at the house.” It was still night when Lopez-Velasco led other officers to the Chemise Road property, where he pointed out the bloodstain on the driveway and the “marijuana garden.” According to one of the officers, Lopez-Velasco was “very nervous about going back there,” and “very afraid” when on the premises showing the layout to the officers. At about 5:00 a.m., the officers met Zepeda-Onofre driving a truck down the driveway. Although it was still dark, and although he was out of sight in the back of a police vehicle, Lopez-Velasco was described as “terrified” while he identified Zepeda-Onofre (who had been taken out of the truck and was being guarded while sitting on the ground in front of the truck, but within Lopez-Velasco’s line of sight). And when Cruz-Santos was apprehended in another vehicle on the premises and brought to the scene, one officer

testified that “I recall him [Lopez-Velasco] trying to . . . duck down and make himself not visible when Sidonio was around.”

The officers then searched the site and found three bags of dried marijuana, and considerable amounts of “dried or drying marijuana.”⁵ As the officers were walking down the driveway, Cruz-Santos’s car drove up and stopped. The car was being driven by a man Lopez-Velasco did not recognize. Cruz-Santos was not in it. Blood splatter marks were visible on the vehicle, as well as “smear marks where it looked like somebody had wiped it up.” The truck driven by Zepeda-Onofre also gave proof of recent bloody use. One officer testified that “I saw dry blood in the bed portion of the pickup truck, and I also saw drag marks which looked like whatever was in the back of the truck was dragged toward the tailgate end . . . of the pickup truck.” Also found were a loaded rifle and ammunition of various calibers.

A prosecution expert, Detective Brandon Van Camp, testified that the cultivation on Chemise Road was an illegal, non-medicinal, commercial operation, designed to evade aerial detection. He estimated the street value of the marijuana was at least \$800 per pound. When asked “What is your training and experience, if any, with regard to firearms in marijuana grows?”, the expert replied: “Well, definitely of all the outdoor marijuana grows that I have been in and certainly most of the training that I’ve been to, there are definitely firearms are involved with outdoor marijuana gardens.” There are “multiple reasons” for the connection: “One is to protect and defend the garden from intruders. Two is to protect it from wildlife” such as deer and rats.

The jury heard forensic testimony that Gabino was shot twice—once in the face and once in the chest—and that either shot would be fatal.

REVIEW

Because it has the most obvious potential to require reversal, we will first address the contention that defendants were convicted of a legally untenable theory of second degree murder.

⁵Officers subsequently searching the premises pursuant to a warrant found a hidden rifle and approximately 180 pounds of marijuana.

The Legal Principles

“ ‘Penal Code section 31, which governs aider and abettor liability, provides in relevant part, “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.” An aider and abettor is one who acts “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” [Citations.]’ “[A] person who aids and abets the commission of a crime is a “principal” in the crime, and thus shares the guilt of the actual perpetrator.’ [Citation.]”

“An aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime. [Citations.] ‘Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.’ [Citation.]

“A consequence that is *reasonably foreseeable* is a natural and probable consequence under this doctrine. ‘A nontarget offense is a “ ‘natural and probable consequence’ ” of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability “ ‘is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.’ ” [Citation.] Reasonable foreseeability “is a factual issue to be resolved by the jury.” [Citations.]’ ” (*Smith, supra*, 60 Cal.4th at p. 611.)

But the reach of the natural and probable consequences doctrine is limited to second degree murder. “[A]n aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles.”

(*People v. Chiu* (2014) 59 Cal.4th 155, 158–159.) “In the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by holding them culpable for the perpetrator’s commission of the nontarget offense of second degree murder.” (*Id.* at p. 165.) “[P]unishment for second degree murder is commensurate with a defendant’s culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine.” (*Id.* at p. 166.)

“The statutes and, accordingly, the natural and probable consequence doctrine, do not distinguish among principals on the basis of whether they directly or indirectly aided and abetted the target crime, or whether they directly or indirectly aided and abetted the perpetrator of the nontarget crime. An aider and abettor of the target crime is guilty of any crime that any principal in that target crime commits if it was a natural and probable, i.e., reasonably foreseeable, consequence of the target crime. [¶] . . . [¶] . . . To establish aiding and abetting liability under the natural and probable consequence doctrine, the prosecution must prove the nontarget offense was reasonably foreseeable; it need not *additionally* prove the nontarget offense was not committed for a reason independent of the common plan to commit the target offense.” (*Smith, supra*, at pp. 613–614.)

The Instructions Given

The jury was initially instructed with a modified version CALCRIM Nos. 417 and 402 as follows:

“A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit no matter which member of the conspiracy commits the crime. A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and

probable consequence of a common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act.

“A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

“A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan.

“To prove that the defendant is guilty of a crime of murder charged in Count 1, the People must prove that the defendant conspired to commit illegal cultivation of marijuana, a member of the conspiracy committed the murder to further the conspiracy, and murder was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit.”

“The defendants are charged in Count 1 with murder, in Count 3 with illegal cultivation of marijuana, and in counts 4 and 6 with assault with a firearm. It is also alleged, although not charged, that the defendants committed the crime of brandishing a firearm in violation of Penal Code Section 417(a)(1).

“You must first decide whether the defendant is guilty of illegal cultivation of marijuana, assault with a firearm or brandishing a firearm. These will be called the target offenses. If you find the defendant is guilty of any of these crimes, you must then decide whether that defendant is guilty of murder.

“Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. To prove that the defendant is guilty of murder under this theory, the People must prove that the defendant is guilty of one of the target offenses; during the commission of the target offenses, a co-participant in that crime committed the crime of murder; and under all of the circumstances, a reasonable person in the defendant’s position would have known that the commission of

murder was a natural and probable consequence of the commission of the target . . . offenses he committed.

“A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

“A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

“If the murder was committed for any reason independent of the common plan to commit the target offense or offenses, then the commission of murder was not a natural and probable consequence of those offenses. [¶] . . . [¶]

“To decide whether target offenses . . . were committed, please refer to the separate instructions that I will provide for those crimes.”

After the jury had been deliberating for three days, the court modified CALCRIM No. 417 with the following: “[T]o prove that a defendant is guilty of the crimes of Assault with a Deadly Weapon, charged in Counts IV and VI, under a conspiracy theory, the People must prove that: 1. The defendant conspired to commit Illegal Cultivation of Marijuana; 2. A member of the conspiracy committed the Assault with a Deadly Weapon to further the conspiracy; AND 3. The Assault with a Deadly Weapon was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit.

“The defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy. A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy has been accomplished. *Conspiracy and aiding and abetting theories of culpability are to be

determined separately, following instruction 417 and instruction 402 which individually define these theories.”⁶

The Initial Arguments

In their initial briefing, defendants contend that the prosecution’s whole reading of the case was off-kilter and misplaced. As Zepeda-Onofre terms it, the jury was given an “invalid theory of liability,” namely, “murder could be a natural and probable consequence of illegal marijuana cultivation or of a conspiracy to illegally cultivate marijuana.” Cruz-Santos covers the same ground from a slightly different angle: the prosecution’s theory for murder was defective “because there was insufficient evidence of the necessary factual predicate, namely, that murder is a natural and probable consequence of a conspiracy to cultivate marijuana.” Zepeda-Onofre joins this argument. Cruz-Santos goes on to attack the court’s instructions because they “failed to instruct on the necessary element of malice.”

In varying degrees, both defendants approach the issue of whether murder can be a natural and probable consequence of marijuana cultivation as something of a theoretical abstraction akin to an issue of law.⁷ It is not. When it has the support of substantial evidence, “the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) This is the rule for both co-conspirator and aider and abettor liability. (See, e.g., *Smith, supra*, at p. 611; *People v. Prettyman* (1996) 14 Cal.4th 248, 269; *People v.*

⁶The modification appears to have been prompted by this question from the jury: “If we decide there *was* a conspiracy to unlawfully cultivate, does the liability of coconspirators apply to the murder charge only? Or, does it apply to *all* charges that we determine are natural & probable consequences of the conspiracy?”

⁷And both focus on only one of the three target offenses identified in the instructions. This could be deemed an implicit concession that the two other target offenses—assault with a firearm and brandishing a firearm—identified in the instructions as target offenses—were sound. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 342, p. 392, § 512, pp. 577–578.) However, we elect to address the merits of defendants’ arguments.

Olguin (1994) 31 Cal.App.4th 1355, 1376; *People v. Luparello* (1986) 187 Cal.App.3d 410, 442–443.)

True, our Supreme Court has repeatedly refused to accept that running a large scale drug operation necessarily entails murder. (*People v. Hinton* (2006) 37 Cal.4th 839, 880 [“Nor do we accept defendant’s suggestion that murder was a natural and probable consequence of any drug deal ‘involving a large sum of money.’ ”]; *People v. Garceau* (1993) 6 Cal.4th 140, 183 [“[t]he record clearly fails to establish, as a *matter of law*, that the killings were a ‘reasonably foreseeable’ consequence of the methamphetamine manufacturing operation conducted on the Rambos’ property.”]) This follows from the nature of the crucial inquiry: “ ‘[T]he ultimate . . . question is one of foreseeability.’ [Citation.] Thus, ‘ “[a] natural and probable consequence is a foreseeable consequence”. . . .’ [Citation.] But ‘to be reasonably foreseeable “[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough” [Citation.]’ [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case . . . and is a factual issue to be resolved by the jury.” (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).) “The precise consequence need not have been foreseen. . . . [¶] . . . The issue is ‘whether, under all of the circumstances presented, a reasonable person in the defendant’s position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act’ ” (*Id.* at p. 927.) In other words, the issue is seldom one of law, almost always one of fact.

“A jury finding of reasonable foreseeability provides the crucial nexus that links a defendant’s culpability for aiding and abetting the target offense to his criminal liability for the nontarget offense. Without that nexus, there is no basis—no legally sufficient theory of causation—to find the defendant culpable for the nontarget offense. Our cases have thus recognized, without exception, that ‘the trier of fact must . . . find that . . . the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.’ ” (*People v. Favor* (2012) 54 Cal.4th 868, 882.)

So, when Zepeda-Onofre argues that the trial court’s instructions “were erroneous . . . because a jury cannot reasonably find that a murder committed by a defendant’s confederate was a natural and probable consequence of marijuana cultivation because there is not a sufficiently close connection between the target crime and commission of murder,” he is rather plainly asking this court to decide, as a matter of law, that murder can never be a natural and probable consequence of cultivating marijuana.

We reject the request. A tie between gunshot death and the clandestine commercial cultivation of marijuana may not be inevitable, but the possibility of a connection has been around at least since *People v. Dillon* (1983) 34 Cal.3d 441, where the defendant was convicted of murder for killing the guard at a marijuana farm. Whether the connection between that offense is a sufficient nexus to foreseeability and liability for murder is a matter of the evidence, which is ordinarily left to the jury when there is substantial evidence. (*People v. Prettyman*, *supra*, 14 Cal.4th 248, 269.) And the presence of substantial evidence is to be explored with generosity to the inferences, credibility determinations, and weighing of the evidence that favor the prosecution. (*People v. Jennings*, *supra*, 50 Cal.4th at pp. 638–639.) This is also the governing approach when the prosecution relies on circumstantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

To repeat, the question is not whether homicide was the most likely consequence or the most foreseeable. Nor is the issue whether murder was even a statistically strong probability. All that is needed is substantial evidence that death was “ ‘a possible consequence which might reasonably have been contemplated.’ ” (*Medina*, at pp. 920, 927.) That there was.

The jury could conclude from the prosecution’s evidence that there was the possibility of gun violence inhered in the marijuana operation. From the testimony of Lopez-Velasco, corroborated in part by Detective Van Camp, the jury could conclude that workers commonly carried loaded firearms with the expectation that they might be needed and were expected to be used. From the incident when Zepeda-Onofre obeyed

the command of Cruz-Santos to “frighten those assholes” making too much noise, the jury could further conclude that neither defendant was averse to having a gun fired at persons who caused irritation. From the incident when the drunken Cruz-Santos brandished his firearm to halt the dispute between Cruz and Lopez-Santiago, the jury could conclude that Cruz-Santos had no inhibition about threatening to use his gun to halt irritation coming from an even closer source, that is, one not coming from an intruder or thief, but emanating from within the garden itself. And from defendants’ use of their guns to kill Gabino and then to coerce Lopez-Velasco and Conrado into disposing of the bodies, the jury could conclude that defendants had no compunctions about using deadly force in order to compel compliance from employees at the very place they were cultivating marijuana.

Then there is the factor of intoxicants. The jury heard evidence from which it could conclude that defendants had ingested cocaine and alcohol. It is not inevitable that near or semi-intoxication will result in death by gunshot. But when the people intoxicated are more or less continually armed because they are engaged in a criminal enterprise, and when the threat of violence—particularly the use of those guns—is not treated as significant, a jury could conclude that this was a witch’s brew of circumstances where a drunken disagreement could escalate.

In these circumstances, it was certainly a reasonably foreseeable consequence that death might result from either brandishing a firearm or committing an assault with it. (*Smith*, at pp. 611, 617.) And when the context of the circumstances is cultivating marijuana, it cannot be excluded from consideration. Murder need not be actually foreseen. (*Smith*, at p. 611.) It need not be the most likely outcome, or even a more likely than not probability.⁸ (*Medina, supra*, at p. 920.) Like our Supreme Court, we are

⁸Our Supreme Court in *Smith* identified an additional consideration: “To be sure, whether an unintended crime was the independent product of the perpetrator’s mind outside of, or foreign to, the common design may, if shown by the evidence, become *relevant* to the question whether that crime was a natural and probable consequence of the target crime. In a given case, a criminal defendant may argue to the jury that the nontarget crime was the perpetrator’s independent idea unrelated to the common plan,

not deciding that death is a natural and probable consequence of running a marijuana cultivation farm. We decide only that in the circumstances attending the manner in which defendants organized and operated this cultivation operation, there was substantial evidence from which the jury could conclude that death was “a possible consequence which might reasonably have been contemplated.” (*Medina*, at pp. 920, 927.)

Cruz-Santos’s attack on the instructions requires only brief comment. He contends that CALCRIM No. 417 “[w]as erroneous, because it failed to instruct the jury that it could not convict appellant of murder unless it found malice.” True enough, but the trial court also instructed the jury with CALCRIM No. 520 to the effect that to convict either defendant of murder required malice and finding the natural and probable consequence of a target offense constituted implied malice.⁹ Instructions are not to be considered in isolation, but regarded in their entirety from the common sense perspective of the jury. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1320–1321.) Thus, the jury was instructed as Cruz-Santos desires. We therefore conclude that he has failed to “demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant.” (*People v. Cross* (2008) 45 Cal.4th 58, 67–68; accord, *People v. Solomon* (2010) 49 Cal.4th 792, 822; *Boyde v. California* (1990) 494 U.S. 370, 380.)

and thus was *not* reasonably foreseeable and *not* a natural and probable consequence of the target crime.” (*Smith*, at p. 617.) Defendants did not adopt this approach, possibly because neither was willing to go beyond the hypothetical and actually identify who was “the perpetrator” that killed the victim.

⁹“The defendant is charged in Count 1 with murder in violation of Penal Code Section 187. To prove that a defendant is guilty of this crime, the People must prove that (1) the defendant committed an act that caused the death of another and (2) when the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought: express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. The defendant acted with implied malice if (1) he intentionally committed an act; (2) the natural and probable consequences of the act were dangerous to human life; (3) at the time he acted, he knew his act was dangerous to human life; and (4) he deliberately acted with conscious disregard for human life.”

The Supplemental Argument

As previously shown, the jury was instructed with CALCRIM No. 402 that “If the murder was committed for any reason independent of the common plan to commit the target offense or offenses, then the commission of murder was not a natural and probable consequence of those offenses.” In *Smith*, our Supreme Court determined that the gist of this sentence was error:

“This sentence, if correct, would mean that a nontarget offense, even if reasonably foreseeable, is not the natural and probable consequence of the target offense if the jury finds it was committed for a reason independent of the common plan to commit the target offense. . . . [¶] . . . Both parties argue that the sentence does not correctly state the law. We agree. To establish aiding and abetting liability under the natural and probable consequence doctrine, the prosecution must prove the nontarget offense was reasonably foreseeable; it need not *additionally* prove the nontarget offense was not committed for a reason independent of the common plan to commit the target offense.” (*Smith*, at pp. 613–614.)

In supplemental briefing (which Cruz-Santos joins), Zepeda-Onofre explains why he believes this error infected his trial: “[The trial] court instructed on a coconspirator’s liability under the natural and probable consequences doctrine for unplanned offenses . . . committed by another member of the conspiracy, but the court’s instruction failed to include the directive that *Smith* found essential, that a coconspirator was *not* liable for an unplanned crime that was a fresh and independent product of the mind of another conspirator that fell outside the common design to illegally cultivate marijuana.”

But the error identified in *Smith* is one that disadvantages the prosecution, not the defendant: “If the prosecution can prove the nontarget crime was a reasonably foreseeable consequence of the crime the defendant intentionally aided and abetted, it should not additionally have to prove the negative fact that the nontarget crime was not committed for a reason independent of the common plan.” (*Smith*, at p. 617.) This was why the court concluded that “because the sentence was unduly favorable to defendant, giving it cannot have harmed him.” (*Ibid.*)

The *Smith* court went on to consider “whether substantial evidence supports defendant’s murder convictions under the natural and probable consequence doctrine. . . . [¶] Defendant contends the evidence was insufficient because the jury could not determine for sure who committed the two murders. The prosecution theory was that Littleton was the killer. But exactly who shot and killed the two victims was not entirely clear. There was evidence that both Littleton and Tovey possessed guns and fired shots. It was not certain which gun Littleton used and which gun Tovey used. But any such uncertainty did not matter as long as the jury unanimously agreed, as to each killing, that, whoever the actual gunman was, that gunman both committed murder, i.e., killed a human being with malice (Pen. Code, § 187), and was a principal in the target crimes. If the jury made those findings and also found that defendant aided and abetted the commission of the target crimes, and the murders were a natural and probable consequence of the target crimes, it could convict defendant of the murders despite uncertainty as to who exactly the killer was.” (*Smith*, at p. 617.)

“ “[A]s long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator [¶] . . . [¶] Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes . . . the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other.” [Citations.] Defendant contends that different facts would support aiding and abetting liability and liability as a direct perpetrator, but, as we have explained, the jury need not unanimously agree “on the precise factual details of how a killing under one or the other theory occurred in order to convict defendant of first degree murder.” [Citation.] Naturally, in order to return a guilty verdict, the jury must agree unanimously that each element of the charged crime

has been proved, but the factors that establish aiding and abetting liability are not included as elements of the crime of murder. [Citation.]” [Citation.]’

“ ‘The jury must agree on a “particular crime” [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and others believed her guilty of another.’ [Citation.] In this case, this means that ‘the jury must unanimously agree on guilt of a specific murder’—McCarthy’s murder in one count and Hunt’s murder in another. [Citation.] But additional unanimity is not required. [Citation.] ‘Once the discrete event is identified, for example, the killing of a particular human being, the theory each individual juror uses to conclude the defendant is criminally responsible need not be the same and, indeed, may be contradictory.’ [Citation.] It suffices if the jury unanimously agrees that the prosecution has proven beyond a reasonable doubt every element necessary to establish guilt of a discrete crime. [¶] . . . Although substantial evidence would support a verdict on that basis, we are not so sure that was the sole basis for the verdict given the uncertainty in the evidence and the trial court’s instructions. The court instructed the jury that its ‘verdict’ on each count had to be unanimous, but it gave no other unanimity instruction. It is possible that one or more of the jurors were not entirely certain exactly who fired the fatal shots, but all were convinced beyond a reasonable doubt that, whoever he was, he acted with malice and thus committed murder.

“As we have explained, that finding, if combined with the other findings beyond a reasonable doubt necessary to convict—that whoever committed the murder was a principal in the target crimes, that defendant aided and abetted the target crimes, and that the murders were a natural and probable consequence of the target crimes—would mean each juror was convinced beyond a reasonable doubt that defendant was guilty of murder. No additional unanimity is required. The jury certainly had to find that someone committed murder. But the ‘jury simply did not have to find’ exactly who that person was. [Citation.] . . .

“Applying these rules here, the jury could readily have found as to each murder charge that the actual killer, whether he was Littleton or Tovey Moody or some other member of Pueblo Bishop, committed a discrete murder, i.e., that he killed McCarthy as

to one count and Hunt as to another, and that he acted with malice regarding each killing. The jury could also have reasonably found that all of the possible shooters were aiders and abettors, and therefore principals, in the target offenses. Each juror could reasonably reject the possibility that some stranger to the jump out happened to come by at that moment and fired the fatal shots. The evidence also fully supported a finding that defendant aided and abetted the target offenses. Accordingly, the jury could reasonably find defendant guilty of the nontarget murders if they were the natural and probable consequence of the target offenses.” (*Smith*, at pp. 618–619.)

These principles are not hard to apply here. Unlike *Smith*, this prosecution involved only one murder. On their verdicts for count one, the jury found Cruz-Santos and Zepeda-Onofre guilty of the second degree murder of Gabino. The verdicts do not identify who pulled the trigger: each verdict shows the jury’s finding “Not True” the allegations that each defendant “personally and intentionally discharged a firearm which caused great bodily injury or death to Gabino Lopez-Santiago.” But the verdicts also recorded the jury’s findings that each defendant “personally used a firearm” and that “in the commission . . . of the above offense [Gabino’s murder], a principal in said offense was armed with a firearm, to wit: a Handgun.” Thus, although the jury did not specify which defendant fired the fatal shots, the jury did conclude that both Cruz-Santos and Zepeda-Onofre were principals in the murder.

Witness Intimidation Instructions

Section 136.1, subdivision (a)(1) penalizes a person who “[k]nowingly and maliciously” prevents, dissuades, or attempts to prevent or dissuade, “any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.” Subdivision (c)(1) elevates any of these acts to a felony when “accompanied by force or by an express or implied threat of force or violence.” Cruz-Santos was convicted of violating section 136.1, subdivision (c)(1). He makes a number of claims as to why this conviction must be overturned.

The jury was instructed with CALCRIM No. 252 that this was a general intent offense. Cruz-Santos contends this was error. “The crime of attempting to dissuade a

witness from testifying is a specific intent crime. [Citation.] ‘Unless the defendant’s acts or statements are intended to affect or influence a potential witness’s or victim’s testimony or acts, no crime has been committed’ ” (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 806.) Because this was misinstruction on an element of the offense, Cruz-Santos correctly identifies this as error of federal constitutional magnitude. (*Neder v. U.S.* (1999) 527 U.S. 1, 15; *People v. Gonzalez* (2012) 54 Cal.4th 643, 662–663.) This error has been held harmless in instances where the defendant’s statements or acts are not ambiguous, but clearly convey an explicit warning. (*People v. Jones* (1998) 67 Cal.App.4th 724, 727–728; *People v. Brenner* (1992) 5 Cal.App.4th 335, 339–340.) Virtually at the same moment Cruz-Santos was ordering Lopez-Velasco to dispose of the victim’s body, while tapping Lopez-Velasco on chest with a gun, he was also telling Lopez-Velasco “if I said something or if I whispered something, that he was going to find me here or in Mexico and my family to do the same to me.” There was no ambiguity here. Cruz-Santos was threatening Lopez-Velasco—talk and you will die. Your family will die. Here or in Mexico. We also note that the jury was also instructed that conviction required the prosecution to prove that Cruz-Santos “*knew* he was trying to prevent or discourage Ramon Lopez-Velasco from making a report to law enforcement and *intended* to do so.” (Italics added.)¹⁰ In these circumstances the error was harmless. (*Chapman v. State of California* (1967) 386 U.S. 18, 24.)

¹⁰As relevant here, the jury was instructed with CALCRIM No. 2622 as follows: “The defendant Sidonio Cruz-Santos is charged only in Count 2 with intimidating a witness in violation of Penal Code Section 136.1. To prove that the defendant is guilty of this crime, the People must prove that (1) the defendant maliciously tried to prevent or dissuade Ramon Lopez-Velasco from making a report to any law enforcement officer that someone else was a victim of a crime or the defendant maliciously tried to prevent or discourage Ramon Lopez-Velasco from causing or seeking the arrest of someone in connection with a crime, (2) Ramon Lopez-Velasco was a witness, and (3) the defendant knew he was trying to prevent or discourage Ramon Lopez-Velasco from making a report to law enforcement and intended to do so. [¶] A person acts maliciously when he . . . intends to interfere in any way with the orderly administration of justice.”

Cruz-Santos contends this omission was aggravated when the jury was instructed that it could not consider evidence that he was intoxicated in deciding whether he was guilty of violating section 136.1.¹¹ Because the jury was allowed to consider voluntary intoxication as affecting other charges, the trial court must have accepted Lopez-Velasco's testimony on this point as substantial evidence, and thus, it was error not to extend recognition of the principle to the intimidation count. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.) However, this was state law error. (See *People v. Pearson* (2012) 53 Cal.4th 306, 325; *People v. Letner* (2010) 50 Cal.4th 99, 186–187.) The jury did not think Cruz-Santos sufficiently impaired to acquit him of murder, nor to reject liability as an aider and abettor, which were identified in CALCRIM No. 252 as requiring specific intent, a concept reiterated in CALCRIM Nos. 401 and 520. Moreover, as previously mentioned, the jury was told that convicting Cruz-Santos of intimidation required that he acted maliciously, that is, intentionally. (See fn. 10 and accompanying text, *ante*.) Thus, the omission can be deemed harmless because “ ‘the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury’s consideration since it has been resolved in an other context’ ” (*People v. Wright* (2006) 40 Cal.4th 81, 98.)

¹¹The jury was instructed with CALCRIM No. 625 as follows: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation or the defendant acted with a specific intent required for aiding and abetting or for conspiracy. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose. Do not consider evidence of intoxication in deciding whether murder is a natural and probable consequence of the named target offenses.”

Although Cruz-Santos doesn’t expressly say it, logically he is arguing that the jury should have been instructed with CALCRIM No. 3426 (jury may consider voluntary intoxication in determining whether the defendant acted with the specific intent or mental state required for conviction).

Lopez-Velasco as Accomplice

Cruz-Santos contends that error on several levels attended the admission of Lopez-Velasco's testimony. Cruz-Santos first argues that the evidence demonstrated, as a matter of law, that Lopez-Velasco was an accomplice of both defendants. Thus, the trial court erred in not instructing the jury with CALCRIM No. 335 to that effect, but rather allowing the question of whether Lopez-Velasco was an accomplice to be decided by the jury as an issue of fact (CALCRIM No. 334). Proceeding from the premise that Lopez-Velasco was an accomplice, Cruz-Santos then submits that his testimony lacks sufficient corroboration.

“Section 1111 prohibits a defendant from being convicted on the uncorroborated testimony of an accomplice. Accomplice testimony must be corroborated by ‘other evidence as shall tend to connect the defendant with the commission of the offense. . . . [¶] An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.’ [Citation.] In other words, ‘[t]o be so chargeable, the witness must be a principal under [Penal Code] section 31. That section defines principals as “[a]ll persons concerned in the commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission. . . .” [Citation.] An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets.’ [Citation.]

“Unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence, whether a witness is an accomplice is a question for the jury. On the other hand, the court should instruct the jury that a witness is an accomplice as a matter of law when the facts establishing the witness's status as an accomplice are ‘ “ ‘clear and undisputed.’ ” ’ [Citations.]” (*People v. Williams* (2008) 43 Cal.4th 584, 635–636.)

Although the prosecution was willing to concede that Lopez-Velasco was an accomplice to the cultivation charge, Cruz-Santos errs in extrapolating that “[i]pso facto, he was an accomplice” in all the other offenses except those where he was named as the victim. The fact that Lopez-Velasco had once been charged with participation in the murder does not label him as an accomplice as a matter of law for all time. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 432 [“the fact that Tannis was initially charged in the case is not dispositive”].) The language of *People v. Richardson* (2008) 43 Cal.4th 959, 1024 is particularly apt: “While it is true . . . that Marshall was at one point charged with [the] murder, it is also true that after he told police defendant had confessed to him, the charges were dropped. On this record then, it cannot be said that the evidence that Marshall was an accomplice . . . was undisputed either in terms of the facts or the inferences to be drawn therefrom.”

In his opening brief, Cruz-Santos states his case why Ramon Lopez-Velasco was an accomplice as follows: “Ramon was the only witness who testified that Sidonio was conspiring and working with other people—namely, Augustin [Zepeda-Onofre], Conrado, and Ramon—to cultivate marijuana. Ramon was the only witness who testified that Sidonio hired others to work on the marijuana garden. Ramon was the only witness who testified that Sidonio possessed firearms. [¶] Ramon was the only witness who testified that Sidonio was present at the gathering on Saturday evening, drinking beer, and celebrating the marijuana harvest. Ramon was the only witness who claimed Sidonio became angry at Conrado and Gabino. Ramon was the only witness who claimed Sidonio had a handgun after the shooting. Ramon was the only witness who claimed Sidonio grabbed Conrado by the shirt and the neck, while holding a handgun, and ordered Conrado not to tell anyone what he saw. Ramon was the only witness who claimed Sidonio said, after the shooting, that Gabino had ‘gone to hell,’ ‘just because I want to.’ Ramon was the only witness who claimed Sidonio told him and Conrado to carry the body away. [¶] Without Ramon’s testimony, the prosecution had no case against Sidonio for murder, conspiracy to cultivate marijuana, ADW upon Gabino, or ADW upon Conrado.”

But Cruz-Santos undercuts his argument by conceding “Some factual details of Ramon’s testimony were corroborated by other sources. For example, he eventually told the police where he dumped Gabino’s body. The victim’s blood was found where Ramon told them to look. The marijuana garden was located as Ramon described. . . . [W]hile some of these details may have corroborated Ramon’s testimony where and when the homicide occurred, none of it corroborated Ramon’s claim that Sidonio was personally involved.” Knowing where the victim’s body would be found corroborates Lopez-Velasco’s testimony as to how it came to be there—because he put it there, at defendants’ order, very shortly after he saw defendants moving towards where the victim was last seen alive. The same is true for Lopez-Velasco knowing where the victim’s blood could be found on the driveway of the garden property.

“The court’s task was not to determine whether the jury *could* reasonably find [the witness] was an accomplice, but rather whether it could *only* reasonably find that he was an accomplice.” (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th 335, 430, some original italics omitted.) The trial court performed that task without error.

The requisite quantum of corroboration may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offenses. Certainly the prosecution need not present corroboration of every aspect and detail of the witness’s testimony. “Only a portion of the accomplice’s testimony need be corroborated” (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 25.) “The evidence ‘is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.’ ” (*People v. Lewis* (2001) 26 Cal.4th 334, 370.) “[E]vidence of corroboration . . . is sufficient if it connects defendant with the crime, although such evidence ‘is slight and entitled, when standing by itself, to but little consideration.’ ” (*People v. Holford* (1965) 63 Cal.2d 74, 82.) Thus, even if Lopez-Velasco did as a matter of law qualify as an accomplice, the failure to so instruct the jury would be harmless because his testimony, as noted above, had ample corroboration. (*People v. Manibusan* (2013) 58 Cal.4th 40, 95; *People v. Whalen* (2013) 56 Cal.4th 1, 60.)

Third Party Culpability

Quoting the caption of his brief, Cruz-Santos submits that “the trial court erred in excluding evidence that Conrado lied to the police in claiming that Gabino was home and asleep, and in claiming a false alibi; and the trial court erred in barring the defense from arguing that those lies, plus Conrado’s flight to Mexico, showed Conrado’s consciousness of guilt.” He elaborates: “When Conrado was arrested by police at 3:00 a.m., he told several lies. He denied any knowledge of the homicide. He falsely told the police that Gabino was home and asleep. He falsely told the police his truck was parked outside his house. He gave himself a false alibi, by telling the police that he came home at 6:25 p.m. [¶] The trial court excluded Conrado’s statements, even though defense counsel established that they were not hearsay, because he sought to admit them for their falsity, rather than for their truth. The trial court also barred [Cruz-Santos] from arguing to the jury that Conrado’s flight to Mexico showed consciousness of guilt.” Thus, this “evidence of third party culpability should have been admitted,” and the trial court’s ruling violated Cruz-Santos’s due process rights under the state and federal constitutions to present a defense.

The modern authority for permitting a defendant to introduce evidence that another person committed the crime traces to *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*). As our Supreme Court summarized: “ ‘[T]he standard for admitting evidence of third party culpability [is] the same as for other exculpatory evidence: the evidence [has] to be relevant under Evidence Code section 350, and its probative value [cannot] be “substantially outweighed by the risk of undue delay, prejudice, or confusion” under Evidence Code section 352.’ ” (*People v. Kaurish* (1990) 52 Cal.3d 648, 685, citing *Hall* at p. 834.) “ ‘To be admissible, the third-party evidence need not show “substantial proof of a probability” that the third party committed the act; it need only be capable of raising a reasonable doubt of defendant’s guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party’s possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s

guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.’ (*People v. Hall, supra*, 41 Cal.3d at p. 833.)” (*People v. Hamilton* (2009) 45 Cal.4th 863, 914.)

As for Cruz-Santos’s due process arguments, *Hall* itself recognized: “As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] . . . [T]his principle applies perforce to evidence of third-party culpability [¶] . . . [N]ot one [authority] suggests that third-party culpability evidence must be admitted no matter how remotely relevant and without considering its potential to disrupt orderly proceedings.” (*Hall*, at pp. 834–835.) “[C]ourts should simply treat third-party culpability evidence like any other evidence” (*id.* at p. 834), and if excluded under Evidence Code section 352, “a trial court’s broad latitude in this respect will not be upset on appeal absent a showing of abuse of discretion.” (*People v. Robinson* (2005) 37 Cal.4th 592, 626.)

Our Supreme Court still adheres to that view. (E.g., *People v. Lucas* (2014) 60 Cal.4th 153, 270; *People v. Edwards* (2013) 57 Cal.4th 658, 729; *People v. McWhorter* (2009) 47 Cal.4th 318, 368.) And so also does the United States Supreme Court: “While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326.)

One could ascertain from Cruz-Santos’s brief that the trial court’s ruling came after extensive arguments that occupy more than 30 pages of reporter’s transcript. The court deliberated overnight, and then stated its ruling, which deserves quotation at length:

“[T]here’s a lot of factual underpinnings to this ruling that . . . weigh very heavily in the 352 process. . . . 352 is always a guiding principle and not wasting the jury’s time

sending them off, all the parties off in different avenues that may unduly consume time. But in this matter, the Court is more concerned about misleading the jury, confusing the jury, and prejudice that may result to all parties. So that's really what my focus is in considering [Cruz-Santos's] request to have some additional information put before the jury regarding Conrado's false statements, as well as evidence regarding his being absent from this trial.

"Now, so I want to just very carefully . . . go through some of the things that were important to the Court in going through its 352 analysis. [¶]. . . [¶]

". . . Ramon circumstantially placed Sidonio and Augustin as firing shots at Gabino. All the statements and circumstances, evidence have Sidonio, Augustin, and Ramon as armed and protecting the marijuana garden. Conrado has Sidonio and Augustin as firing and at Gabino. There is some confusion, certainly There is a certain lack of clarity, but the Court isn't convinced that there was an unknown additional person identified by Conrado because of the confusion in the names. It's apparent in the statement.

"Both Conrado and Ramon . . . have Sidonio in charge. It's clear by the evidence so far that that's the situation. Augustin was identified as a gunman and labored in the marijuana garden, just as Ramon becomes a worker and co-participant in this conspiracy to cultivate and protect the marijuana garden.

"I've already mentioned that there is some evidence in the record that Sidonio became angry with the arguing that was going on while they were drinking and using cocaine, not only an issue of who was better as a comparison of people, but also on the issue of Gabino maybe making statements about Conrado's cocaine use to others.

"In the context of this case, the Court puts a lot of emphasis on that as being a motivating matter. At least the drug . . . and alcohol use, that certainly would have clouded any decision process going on that night. Gabino was an outsider, more so than the others, and the threat of being or possibly disclosing this cocaine use to others.

"Now, trying to admit the defense—trying to admit, somewhat picking and choosing, which statements should be excluded as hearsay and which ones should be

admitted is for nonhearsy purposes. Certainly, the Court does believe that Conrado made false statements initially, just as Ramon did.

“The issue of fleeing is somewhat speculative. If you look at this subjectively, we don’t know where he and his family are. We don’t know if something bad really did happen to them. And, certainly, we wouldn’t want the jury to speculate about that with the evidence that’s in the record of threats having been made on the scene the night of homicide.

“Certainly, any aspect of that would be highly prejudicial if it was emphasized in trial, whether he deliberately fled because of some kind of issue of culpability or because of fear for his life or because . . . something awful has already happened to him, as he suspected and was fearful, at least as expressed early on to law enforcement, that he was very concerned about his family.

“So picking and choosing the issue of what hearsay statements come in for a nonhearsay purpose or the fleeing would be highly prejudicial and potentially highly prejudicial to all parties and, additionally, highly misleading if all the evidence didn’t come in. And, certainly, the only way that all the evidence could come in is if Conrado was here to testify and [be] subject to the crucible of cross-examination, and direct, for that matter.

“It really is pure speculation that he fled because of fear of his immigration issues and now intense law enforcement interest in him or culpability for the role he played in the conspiracy. And, certainly, the Court finds that he was very much engaged in this conspiracy. He provided labors. He was there in the cultivation of marijuana.

“Certainly, the stronger evidence is he fled out of fear of the case, meaning the fear of the defendants and any known or unknown associates. The fact that he fled because of culpability is a lesser issue.

“So to place evidence of his fleeing—and the defense is what’s calling it fleeing. I know all parties have probably made significant attempts. Certainly, I have the exhibit that the defense gave me on the People’s attempts to interview and meet with him and track him down. But fleeing is certainly a conclusionary statement. He’s just—neither

party has come up with him to place him before the jury; but it would be highly prejudicial, highly misleading if his other statements of fear weren't also admitted for a nonhearsay purpose.

"And, additionally, placing in the initial lies without also including the entirety of his statement to put that into context and how that evolved would be highly misleading. All of this would take time. It would divert the jury. It would allow both sides to argue speculation, all parties, without the witness actually being present. And that's the real danger of admitting hearsay statements.

"I don't believe there would be any possible limiting instruction that would diminish the prejudice or misleading nature of admitting some but not all of the hearsay statements.

"The Court also has seen nothing in the record, not any statement, whether admissible or otherwise, that places a gun in Conrado's hand. There's no direct or circumstantial evidence that Conrado was the shooter.

"Certainly, a jury could find, just as they could find, with Ramon, that he was a participant in the conspiracy to cultivate marijuana, as I stated previously. Both defendants and Ramon also could be found by the jury to equally be armed and in furtherance of that conspiracy, but not Conrado.

"So, in substance, the Court does find . . . that this is really collateral evidence. It's insignificant as far as any direct or possible role that Conrado had, culpability beyond the cultivation in actually committing the murder. I think it would incur speculation. I think it would generate speculation by admitting some but not all the evidence. It would unduly consume time in giving all parties a pursuit of this highly speculative evidence. If—certainly, if he comes and testifies—and I don't know if any efforts are still being made to find him—all this could be remedied. And, certainly, the Court's rulings would be far easier if we had him subject to cross-examination and direct.

"So, in the absence of anyone producing this witness, I do find under 352 that the probative value of what the defense asks to admit is far outweighed by its prejudice. I do

find it's not just substantial prejudice, it's extreme prejudice, to put it in the way the defense has advocated for.

“Further admissions, some admission of hearsay regarding false statements in the very initial stages of the investigation, whether—and we haven’t focused on the wife, but certainly she hasn’t been produced by any party, either, as a witness. And I don’t have any factual backdrop. I’m assuming that all the efforts by law enforcement to focus on finding Conrado also included the spouse. But, in any case, those initial misleading statements, without further context of all statements, would be extremely misleading and extremely prejudicial. . . .

“So I’m not really focusing on the additional delay or undue consumption of time, but that’s an element of all these extraneous matters. I just am ruling in favor of the People in this regard and prohibiting that evidence to come in. A lot of evidence is already in. You know, Conrado’s been placed on the scene. He’s been placed as a co-conspirator, to a certain extent. The motive, if any, that comes out of those arguments is before the jury. And anything that’s before the jury may be properly argued by the parties as to their meaning, if any. But as far as putting in this additional evidence at this time, the Court excludes it.”

Conspicuously absent from Cruz-Santos’s brief is any real or systematic attempt to dismantle or refute the court’s reasoning.

It is certainly a gross exaggeration to claim the trial court’s ruling left Cruz-Santos helpless before the jury. “[T]he trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense. . . .” (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) The ruling did not prevent him from attacking the credibility of Lopez-Velasco hammer and tongs, and the lack of corroboration for his version.¹² And the ruling did not prevent counsel from drawing the jury’s attention to

¹²In his closing argument, Cruz-Santos’s attorney asked the jury to see this as “a one witness case, a witness that is bought and paid for by the prosecution, and will testify to anything. And you’ve heard him testify about anything, and in the end, I submit you cannot believe him. And his testimony, even if you didn’t find him to be an

other evidence that Lopez-Velasco made false statements to police, and that those statements had significant discrepancies in them. Zepeda-Onofre's counsel was, if anything, even more slashing.¹³ The trial court's ruling did not categorically foreclose the defense arguing that Conrado was not an innocent, but was actually involved in Gabino's death. Nor should it be forgotten that counsel's efforts apparently persuaded the jury not to convict Cruz-Santos of first degree murder. In short, "the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense. . . ." (*People v. McNeal, supra*, at p. 1203.) No abuse of discretion is shown here.

accomplice . . . , it is just not worthy of belief that Sidonio committed these crimes. And when you look at it through the eyes of accomplice testimony, that needs corroboration before you can find anyone guilty on only that evidence, then there is really doubly no evidence against Sidonio Cruz-Santos." "Is there any corroboration for any of the statements? Is there any physical evidence in this case connecting Sidonio Cruz-Santos to the crime? There is nothing. Is there any gunshot residue on him? Is there anything suggesting that he did this? No. There is nothing. There is no physical evidence of any type that connects him to the offense or to the story that Ramon is giving you." "I introduced into evidence . . . the shirt of Ramon. This is Ramon's shirt. This is the shirt with no blood on it. This is the shirt he says he was wearing So if Ramon's story is to be believed, how does a person who grabs a body, who doesn't go home to change, grabs the body, holds the body on two occasions and doesn't get any blood on his sleeves?"

¹³"Ramon . . . is central to this case. Can't get away from it. [The] People can't avoid it. He's the one who sees or hears That's the bed Ramon has made for himself in this case. [¶] Now the lies are obvious And he didn't just lie, . . . he made up dialogue, it was like script writing. . . . He becomes the hero. . . . [T]here is the lie [T]hat lie is toxic. That lie is an indication that this man who sat in front of seasoned detectives and told it several times, he's good. And I don't mean good in a good way. He lied so well these detectives bought it. . . . I will go over some of the credibility instructions . . . instruction [CALCRIM No.] 226, witnesses. Man this list is like Ramon written all over it." "[T]his guy lies about stuff . . . there is no point in lying about." "[T]his area is apparently pitch black. Right, that night it is pitch black. It is foggy I think people were saying. Nobody had flashlights, had a lantern. This wasn't like a campsite, . . . yet Ramon the all knowing sees everything. . . ."

Sentencing Error

The final contentions come from Cruz-Santos, who claims that the trial court erred in sentencing him. First, he claims that he should not have been sentenced to eight years (midterm of three years plus five years for the arming enhancement [§ 12022.5]) for violating section 136.1. However, when the Attorney General pointed out section 1170.15 required the sentence, Cruz-Santos withdrew his claim.¹⁴

Next, Cruz-Santos argues section 654 requires that the sentences for the cultivation and assault charge on Gabino be stayed because they were integral to the murder of Gabino. We disagree.

“It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the ‘same act or omission.’ [Citation.] However, because the statute is intended to ensure that defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.] [¶] It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to

¹⁴“Notwithstanding subdivision (a) of Section 1170.1, which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 . . . , the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury.” (§ 1170.15.)

each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.] Although the question of whether defendant harbored a ‘single intent’ within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Just what were the defendant’s criminal objectives, or how many objectives were harbored by the defendant, are issues of fact given over to the trial court’s determination. And in situations where a trial court imposes separate sentences, a reviewing court looks to whether substantial evidence supports the sentencing court’s implied finding that the defendant had more than a single criminal objective. (*People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Osband* (1996) 13 Cal.4th 622, 730–731.)

Gabino made his first, and only, appearance in the picture on the night he died. By contrast, it was evident that the marijuana cultivation was already a going concern. It follows that the objective for that enterprise existed before any thought of homicide. Because there were separate criminal intents, separate sentences were not forbidden by section 654.

Assault is defined as “[a]n unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Because “assault criminalizes conduct based on what *might* have happened—and not what *actually* happened,” “assault does not require a specific intent to injure the victim.” (*People v. Williams* (2001) 26 Cal.4th 779, 787, 788.) It follows that when the assault is committed with a firearm, neither actual discharge of the weapon nor physical injury is required. (*People v. Chance* (2008) 44 Cal.4th 1164, 1167–1168; *People v. McCoy* (1944) 25 Cal.2d 177, 190–191.) Thus, if present ability is demonstrated (see *People v. Chance*, *supra*, at p. 1172, fn. 7 [“assault cannot be committed with unloaded gun”]), and the jury clearly concluded that it was (see *People v. Rodriguez* (1999) 20 Cal.4th 1, 12 [“a defendant’s statements and behavior while making an armed threat against a victim may warrant a jury’s finding the weapon was loaded”]), the mere threat to use the firearm

would constitute assault with it. This has been the law in California since 1857. (See *People v. Colantuono* (1994) 7 Cal.4th 206, 219; *People v. McCoy*, *supra*, at pp. 192–193 [both citing and quoting *People v. McMakin* (1857) 8 Cal. 547, 548].) Accordingly, when Cruz-Santos brandished a handgun and told the quarreling Gabino and Conrado that “the devil is touching me and I can be capable of anything,” this could be treated as an assault intended to halt the quarrel. The homicidal use of the weapon would come later and have a different intent. Again, separate sentences were not forbidden by section 654.

DISPOSITION

The judgments of conviction are affirmed.

Richman, J.

We concur:

Kline, P.J.

Miller, J.

A139860; *People v. Cruz-Santos*

Court of Appeal, First Appellate District, Division Two - No. A139860
S231292

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

SIDONIO CRUZ-SANTOS et al., Defendants and Appellants.

The petitions for review are denied.

Kruger, J., was absent and did not participate.

Cantil-Sakauye
Chief Justice

CONCURRING STATEMENT

by Cantil-Sakauye, C.J.

In light of the dissenting statement, we note that reasonable minds may differ about the characterization of the record below. Furthermore, it is well established that this court’s denial of a petition for review is not an expression of the court’s opinion concerning the correctness of the underlying appellate decision, or its result, or of any law stated in that decision. (*People v. Davis* (1905) 147 Cal. 346, 349-350; see also, e.g., *People v. Triggs* (1973) 8 Cal.3d 884, 890-891; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 502, p. 564 [“Practical evidence of [this proposition] is furnished by examples of disapproval of cases in which a hearing was denied only a few years before the disapproving Supreme Court decision”].)

Werdegar, J., Chin, J., & Corrigan, J., concur.

DISSENTING STATEMENT

by Liu, J.

The natural and probable consequences doctrine is a theory of accomplice liability. Under an aiding and abetting theory or a conspiracy theory, “[a] nontarget offense is a

‘natural and probable consequence’ of the target offense if, judged objectively, the additional offense was reasonably foreseeable.” (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) Neither the aider and abettor nor the coconspirator needs to actually foresee the nontarget offense. “Rather, liability “‘is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.” ’ [Citation.] Reasonable foreseeability ‘is a factual issue to be resolved by the jury.’ [Citation.]” (*Id.* at p. 162.) As in this case, the natural and probable consequences doctrine often exposes a defendant to harsh punishment for “a crime of intent although his culpability regarding its commission may be no greater than that of negligence.” (Dresser, *Understanding Criminal Law* (2d ed. 1995) § 30.05[B][5], p. 444.)

In *Chiu*, we imposed a restriction on the natural and probable consequences doctrine. We held that a defendant cannot be convicted as an aider and abettor of first degree murder as a natural and probable consequence of any target offense because “the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated.” (*Chiu, supra*, 59 Cal.4th at p. 166.) Our holding recognized that, as a matter of law, there are limits to what can be considered a reasonably foreseeable outcome of an intentional act and, in turn, limits to an accomplice’s culpability.

This case similarly tests the legal limits of foreseeability under the natural and probable consequences doctrine. The question here is whether defendants could be convicted of second degree murder, an inherently violent offense requiring an act of killing with malice aforethought (Pen. Code, § 187), on the theory that it was a reasonably foreseeable consequence of unlawful marijuana cultivation, an offense requiring no proof of violent conduct or intent (Health & Saf. Code, § 11358). The gap in culpability between these two offenses is reflected in the fact that second degree murder carries a minimum sentence of 15 years to life (Pen. Code, § 190, subd. (b)), whereas unlawful cultivation carries a maximum sentence of three years (*id.*, § 1170, subd. (h)). Although there may be cases where the concept of foreseeability can bridge this culpability gap, I doubt this is one. As explained below, the record appears devoid of evidence that links the murder in this case to the cultivation offense.

The narrow issue presented concerns the sufficiency of the evidence. But there is also an important legal principle to be elucidated here: Given the elasticity of the concept of foreseeability, trial courts have a key role to play in assessing whether, on the facts of a particular case, a natural and probable consequences theory of accomplice liability should go to the jury. This gatekeeping role is essential to ensuring that such liability is kept “consistent with reasonable concepts of culpability.” (*Chiu, supra*, 59 Cal.4th at p. 165.) Because this case presents an opportunity to provide that guidance, and because defendants are serving life sentences on a theory of murder that appears unsupported by sufficient evidence, I would grant review.

I.

Defendants Sidonio Cruz-Santos and Augustin Zepeda-Onofre worked an illegal marijuana growing operation (“the garden”). On the night in question, they hosted an employee (Ramon) and three other men (Conrado, Gabino, and Angel) at the garden. Defendants first met Ramon three days earlier through Conrado and hired Ramon to work at the garden. Gabino, whom defendants had not met before, was Conrado’s roommate and Ramon’s brother-in-law. The evening began with drinks and food, and eventually some of the men used cocaine. At some point, Cruz-Santos became irritated when he heard the sound of all-terrain vehicles (ATVs) nearby. He instructed Zepeda-Onofre to shoot a gun into the air to “frighten those assholes,” and Zepeda-Onofre complied.

Later that evening, Conrado and Gabino began arguing about whether Gabino told Conrado’s wife that Conrado used cocaine. Cruz-Santos became annoyed at their bickering, so he drew his gun and told the two men: “If you have problems in your house then go fix them in your house. But don’t come here and give me problems. Because the devil is touching me and I can be capable of anything.” Ramon urged the two men to leave, and Conrado, Gabino, and Ramon left the garden and walked toward the driveway that led off the property. Conrado said he was too drunk to drive and asked Ramon to get his truck.

As Ramon walked to the truck, he noticed that Cruz-Santos and Zepeda-Onofre were walking toward the end of the driveway where Conrado and Gabino were waiting. He then heard several gunshots. He continued walking, got into the truck, and drove back to the driveway. When he returned, he saw Conrado on the ground with Cruz-Santos pointing his gun toward Conrado’s head. Ramon heard Cruz-Santos say that Conrado shouldn’t say anything about what he saw or else he would find and kill his family. Ramon asked about Gabino, and Cruz-Santos told him that Gabino “had gone to hell.” Ramon asked Cruz-Santos why, and Cruz-Santos said, “because I want[ed] to.” Ramon asked again about Gabino, and Cruz-Santos told Zepeda-Onofre to show Gabino’s body to Ramon. Cruz-Santos demanded that Ramon and Conrado take Gabino’s body and dispose of it. After getting the body into the truck, Conrado refused to get in. Ramon got in, drove the truck, dumped the body, and then notified the police.

Ramon was initially charged and held for the murder, but those charges were dropped when he agreed to cooperate. Both defendants were arrested and charged with second degree murder, unlawful cultivation of marijuana, three counts of assault with a firearm, and firearm-related enhancements. Ramon testified against defendants.

At the end of trial, the court heard counsel’s arguments on the proposed jury instructions. The parties disagreed with respect to CALCRIM No. 402, titled Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged). Objecting to the instruction, defense counsel said: “[T]he bottom line [of] the theory is that if you

cultivate marijuana and that you are armed, that natural and probable consequences is that you are guilty of murder. What evidence did we hear that that's the case? . . . [T]heir witness said they were having a party at the marijuana grow and they went down there and there was a dispute between Conrado and Gabino, and then where Ramon came there and Gabino was shot. And somehow [Cruz-Santos] and [Zepeda-Onofre] made admissions that they were involved. There is no evidence that this relates — that the homicide related to the cultivation of marijuana. [¶] . . . [¶] Here we are just saying well, jury, you don't have any evidence, but you decide whether it is reasonably foreseeable without any evidence and use your own opinions whether it is foreseeable that murder would result from the cultivation of marijuana. That is fundamentally wrong.”

The trial court initially expressed doubts about instructing the jury on this theory: “Is there any case? Because we do have published cases on natural and probable consequences for certain acts. Do we have any published cases on armed marijuana camps? Do we have any at all in the state? Do you have any to proffer to the Court? It is certainly inviting, especially when we first began to litigate these motions and we were picking a jury when the newspaper article came out and said, hey, there is 20 plus unsolved crimes, we don't even know who some of the victims are in marijuana grows in the North Bay, so it is in the context of the Press Democrat and the news article, you think oh boy, this is pretty dangerous. [¶] On the other hand, we probably have 100 marijuana grows in Santa Rosa that haven't resulted in any harm whatsoever, just pulling numbers out of the hat, but between Sonoma, Napa, Mendocino, Lake County, probably thousands of marijuana grows that are armed that hasn't resulted in any accidental discharge or death or the killing of intruders. I think this would be a lot more viable if, in fact, this was an intruder. . . . We actually had something kind of consistent with why you would think they may be armed, that someone comes to steal it and they kill them or someone on an ATV wanders in having recreational purposes, and gets killed. I think it would be more logically consistent to argue for this. [¶] . . . I'm leaning strongly on pulling the plug on this, because I don't see how it is necessary to the People based on the evidence in this case. And I really do think we are kind of filling some gaps by an instruction where we didn't have actual evidence. . . . I remember poignantly one expert saying yeah, it is common to have guns in marijuana camps, but that's a far different cry from it then becomes natural and probable that someone will get murdered as a result of that combination.”

The district attorney responded by arguing that the issue was a factual question for the jury to decide: “I don't know that there is a case specifically about [Health and Safety Code section] 11358 with or without an arming enhancement, but what I do know is that . . . the basic law is that what constitutes a probable and natural consequence is a question for the trier of fact [¶] . . . [¶] . . . [W]hen you put guns, multiple guns in the hands of people while they are cultivating marijuana for the purpose of protecting it, it is not only foreseeable but planned that you are going to use those firearms. . . . [I]f there is some evidence in the record to support a theory of liability, the Court must

instruct on it. They arm themselves and others, meaning [Cruz-Santos] had Ramon armed in a marijuana grow with instructions that this is for either an emergency or to defend yourself, there is the perceived threat to the garden, the garden itself is very covertly placed, strategically placed. This ATV keeps coming by, which is a perceived threat, and the response is somebody is going to shoot a warning shot in the air [¶] . . . Yes, the argument was about cocaine use between Gabino and Conrado. But the fact of the matter is they were drawing unwanted attention to the scene. . . . [T]he evidence supports that theory, whether the Court thinks it is a good theory or not, whether the defense thinks it is a good theory or not.”

Defense counsel responded by saying “there is no case law supporting” the instruction and contrasted it with gang cases: “The reason why disturbing the peace, a [Penal Code section] 415 allowed in gang cases, [is] because there has to be some predicate evidence to show that a person engaged in a fight because of the culture of a gang, natural and probable consequences would be a more violent act, an assault or a murder. . . . In this case there is no basis for it. It is just that they want a jury to be able to say what they think is foreseeable, and we don’t just let juries make their own decisions without evidence.”

Despite its misgivings, the trial court concluded: “I’m going to add [CALCRIM No. 401, ‘Aiding and Abetting: Intended Crimes’] and I’ll give [CALCRIM No.] 402, and based on the evidence that was presented to the jury in the manner and number of firearms and the way it was used, not only in threatening those that work there but also an ATV that came across the scene, I think it is fair to the jury to make the decision. The instruction summarizes the law that they could apply to the facts as they find them.”

Accordingly, the trial court instructed the jury with CALCRIM No. 402 as follows: “You must first decide whether the defendant is guilty of Illegal Cultivation of Marijuana, Assault with a Firearm, or Brandishing a Firearm. These will be called the ‘target offenses.’ If you find the defendant is guilty of any of these crimes, you must then decide whether that defendant is guilty of Murder. [¶] Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. [¶] To prove that the defendant is guilty of Murder under this theory, the People must prove that: [¶] 1. The defendant is guilty of one of the target offenses; [¶] 2. During the commission of the target offense or offenses, a coparticipant in that crime committed the crime of Murder; [¶] and [¶] 3. Under all of the circumstances, a reasonable person in the defendant’s position would have known that the commission of Murder was a natural and probable consequence of the commission of the target offense or offenses he committed.”

The trial court also instructed the jury with CALCRIM No. 417, titled Liability for Coconspirators’ Acts, as follows: “A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or

is not a natural and probable consequence of the common plan. [¶] To prove that a defendant is guilty of the crime of Murder, charged in Count I, under a conspiracy theory, the People must prove that: [¶] 1. The defendant conspired to commit Illegal Cultivation of Marijuana; [¶] 2. A member of the conspiracy committed the Murder to further the conspiracy; [¶] and [¶] 3. Murder was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit.” The jury was also instructed that it needed to evaluate the conspiracy and aiding and abetting theories separately.

After deliberating for one day, the jury submitted a question to the court: “If we decide there was a conspiracy to unlawfully cultivate, does the liability of coconspirators apply to the murder charge only? Or, does it apply to all charges that we determine are the natural and probable consequences of the conspiracy?” The trial court responded by instructing the jury with a modified version of CALCRIM No. 417, which included assault with a deadly weapon as a nontarget offense. The CALCRIM No. 402 instruction was not changed.

The jury convicted both defendants of second degree murder. Although the jury found that both defendants “used” a firearm during the commission of the murder and that a principal in the murder was armed, the jury found “not true” that either defendant “personally and intentionally discharged a firearm” that killed Gabino.

II.

In the Court of Appeal, defendants argued that the trial court erred when it instructed the jury on murder as a natural and probable consequence of unlawful cultivation of marijuana or conspiracy to illegally cultivate marijuana. The Court of Appeal affirmed, holding that “[t]he jury could conclude from the prosecution’s evidence that there was the possibility of gun violence inhere[nt] in the marijuana operation.” But the reasoning in support of this conclusion appears unconvincing.

In *People v. Prettyman* (1996) 14 Cal.4th 248 (*Prettyman*), we said that “[t]o trigger application of the ‘natural and probable consequences’ doctrine, there must be a *close connection* between the target crime aided and abetted and the offense actually committed.” (*Id.* at p. 269, italics added.) Where the target offense involves intentional violence against others, the law holds the defendant accountable for harms, including death, that foreseeably result from the violence he intentionally set in motion, whether or not he intended those resulting harms. *Chiu*, for example, involved a gang fight that escalated into a fatal shooting. (*Chiu, supra*, 59 Cal.4th at pp. 159–160.) The defendant actively participated in the fight and was charged with murder on a natural and probable consequences theory that posited assault (Pen. Code, § 240) or disturbing the peace by unlawfully fighting in a public place (*id.*, § 415, subd. (1)) as the target offense. In that context, where the target offense involved nonlethal yet intentional violence, we said

“punishment for second degree murder is commensurate with a defendant’s culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine.” (*Chiu*, at p. 166.) The risk of violence and danger inherent in the target offense forms the predicate for imposing liability for murder based on foreseeability and makes punishment for murder “commensurate” with the defendant’s culpability. (*Ibid.*) Gang fights that escalate into severe bodily harm or death are paradigmatic circumstances in which we have upheld natural and probable consequences liability. (See *People v. Smith* (2014) 60 Cal.4th 603; *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*); *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*); see also *Prettyman*, at pp. 262–263 [collecting cases].)

The trial court in this case authorized the jury to convict defendants of murder with malice aforethought as a natural and probable consequence of unlawful marijuana cultivation. The offense of unlawful cultivation requires proof that the defendant planted, cultivated, harvested, dried, or processed one or more marijuana plants, knowing that the substance was marijuana. (Health & Saf. Code, § 11358; CALCRIM No. 2370.) It does not require any proof of actual or intended violence. To be sure, one can imagine scenarios in which participants in a marijuana grow operation use guns for the purpose of protecting the operation from thieves, intruders, or law enforcement. In such scenarios, violence against intruders, including murder, may be a foreseeable consequence of the offense of unlawful cultivation. But that is not the scenario we have here.

Ramon, Conrado, and Gabino were not intruders on the grow operation; they were defendants’ guests. The evening consisted of eating, drinking, and using cocaine, not planting, harvesting, drying, or processing marijuana. Gabino and Conrado got into an argument about whether Gabino had told Conrado’s wife that Conrado used cocaine, a subject having nothing to do with marijuana cultivation or defendants’ grow operation. Further, Ramon testified that Cruz-Santos gave him a gun to protect the harvest against wild animals and thieves, not against irritating guests. Cruz-Santos’s irritation at the argument between Gabino and Conrado caused him to draw his gun and tell the two men, “If you have problems in your house then go fix them in your house. But don’t come here and give me problems. Because the devil is touching me and I can be capable of anything.” At no point did Cruz-Santos suggest that his irritation had anything to do with the grow operation. Moreover, as the Court of Appeal observed, Gabino and Conrado walked “out of . . . ‘the garden’ and towards the driveway off the property.” There is no evidence that Gabino or Conrado posed a threat to the grow operation or its secrecy, or that Gabino was killed for any reason related to the grow operation. Indeed, when Ramon asked Cruz-Santos why Gabino had been killed, Cruz-Santos said, “because I want[ed] to.” On this record, the evidence appears insufficient to conclude that the murder of Gabino was a reasonably foreseeable consequence of defendants’ commission of unlawful marijuana cultivation.

While acknowledging that this court “has repeatedly refused to accept that running a large-scale drug operation necessarily entails murder,” the Court of Appeal opined that “[a] tie between gunshot death and the clandestine commercial cultivation of marijuana may not be inevitable, but the possibility of a connection has been around at least since *People v. Dillon* (1983) 34 Cal.3d 441” But *Dillon* involved a defendant who attempted to rob a marijuana farm and, in the process, killed the guard protecting it. (*Id.* at pp. 451–452.) The defendant could not have been convicted of murder as a natural and probable consequence of illegal cultivation because he did not cultivate marijuana or aid and abet cultivation. Instead, he was convicted of murder on a felony-murder theory rooted in his commission of attempted robbery. (*Id.* at p. 450.)

The heart of the Court of Appeal’s reasoning is as follows: “[T]he jury could conclude that workers commonly carried loaded firearms with the expectation that they might be needed and were expected to be used. From the incident when Zepeda-Onofre obeyed the command of Cruz-Santos to ‘frighten those assholes’ making too much noise, the jury could further conclude that neither defendant was averse to having a gun fired at persons who caused irritation. From the incident when the drunken Cruz-Santos brandished his firearm to halt the dispute between [Conrado] and [Gabino], the jury could conclude that Cruz-Santos had no inhibition about threatening to use his gun to halt irritation coming from an even closer source, that is, one not coming from an intruder or thief, but emanating from within the garden itself. And from defendants’ use of their guns to kill Gabino and then to coerce [Ramon] and Conrado into disposing of the bodies [*sic*], the jury could conclude that defendants had no compunctions about using deadly force in order to compel compliance from employees at the very place they were cultivating marijuana.”

This reasoning is unpersuasive. First, although it may be reasonably foreseeable that a grow operation worker who carries a gun will use it to protect the operation, it is not reasonably foreseeable that the worker will use the gun against a person who simply irritates the worker but poses no apparent threat to the operation. Second, as to the ATV incident in which Cruz-Santos ordered Zepeda-Onofre to “frighten those assholes,” the evidence shows that Cruz-Santos ordered Zepeda-Onofre to shoot into the air. This does not support the inference that “neither defendant was averse to having a gun fired *at* persons who caused irritation,” as the Court of Appeal believed. (*Italics added.*) Third, the last sentence of the Court of Appeal’s reasoning above simply begs the question: The fact that Gabino was killed cannot itself serve as a basis for the jury to infer that Gabino’s murder was a natural and probable consequence of defendants’ unlawful marijuana cultivation. (See *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 407 [“ ‘almost any result [is] foreseeable with the benefit of hindsight’ ”].) Altogether, the Court of Appeal’s observations establish only that Gabino’s murder occurred at or near the garden. They do not establish that Gabino’s murder had anything to do with the grow operation, much less that it was a reasonably foreseeable consequence of defendants’ unlawful cultivation of marijuana. There does not appear to be evidence of a

“close connection” (*Prettyman, supra*, 14 Cal.4th at p. 269) between the cultivation offense and Gabino’s murder.

The district attorney argued in the trial court that the jury could conclude that Gabino and Conrado “were drawing unwanted attention to the scene” and thus Gabino’s murder was reasonably foreseeable. But there is no evidence that either defendant was concerned that the argument between Gabino and Conrado was drawing unwanted attention to the grow operation. And even if they had been drawing unwanted attention, Gabino’s murder could not have been reasonably foreseeable in light of the fact that he was killed *after* he and Conrado had walked out of the garden and down the driveway to leave the property.

In her closing argument, the district attorney suggested that defendants, who had not met Gabino before, determined that Gabino was a “snitch” on the basis of Conrado’s accusation (which Gabino denied) that Gabino had told Conrado’s wife that Conrado used cocaine. But again, the evidence shows that Cruz-Santos expressed irritation at Conrado and Gabino’s bickering, not concern about Gabino’s trustworthiness. And when Ramon asked Cruz-Santos why Gabino had been killed, Cruz-Santos simply said, “because I want[ed] to.” There is no evidence that either defendant thought Gabino was a snitch. Of course, we cannot entirely rule out this possibility, but a speculative *possibility* is not a legally sufficient basis to infer that Gabino’s murder was a *natural and probable* consequence of defendants’ participation in working and protecting the garden. Foreseeability must be predicated on more than a theory that rationalizes behavior in hindsight; it must be judged objectively from the standpoint of “ ‘a reasonable person in the defendant’s position.’ ” (Chiu, *supra*, 59 Cal.4th at p. 162.)

In sum, defendants make a strong case that the trial court erred in instructing the jury on second degree murder as a natural and probable consequence of unlawful cultivation or conspiracy to commit unlawful cultivation. The evidence does not appear sufficient to support this theory of malice murder. Further, the instruction on natural and probable consequences appears prejudicial in light of the question submitted by the jury to the court during its deliberations: “If we decide there was a conspiracy to unlawfully cultivate, does the liability of coconspirators apply to the murder charge only? Or, does it apply to all charges that we determine are the natural and probable consequences of the conspiracy?” This question, together with the jury’s “not true” finding on whether either defendant personally shot Gabino, suggests “a reasonable probability that the jury in fact found the defendant[s] guilty solely on the unsupported theory.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; see *College Hosp. Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [the term “reasonable probability” under *People v. Watson* (1956) 46 Cal.2d 818 “does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*”].)

III.

The district attorney persuaded the trial court that foreseeability is a question for the jury, and our cases have said this as well. (See *Chiu*, *supra*, 59 Cal.4th at pp. 161–162; *Medina*, *supra*, 46 Cal.4th at p. 920.) As *Chiu* made clear, however, the issue of foreseeability in this context does not invariably go to the jury. Given the rationale for the natural and probable consequences doctrine, the concept of foreseeability is subject to limitation as a matter of law. *Chiu* explained that punishment for first degree premeditated murder would not be “commensurate with a defendant’s culpability for aiding and abetting” any target offense, even an intentionally violent offense, no matter how foreseeable the resulting murder. (*Chiu*, at p. 166.) “Although we have stated that an aider and abettor’s ‘punishment need not be finely calibrated to the criminal’s mens rea’ (*Favor*, *supra*, 54 Cal.4th at p. 878), the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the . . . public policy concern of deterrence.” (*Ibid.*)

Just as *Chiu* applied “reasonable concepts of culpability” to set a categorical limit on natural and probable consequences liability (*Chiu*, *supra*, 59 Cal.4th at p. 165), trial courts should apply reasonable concepts of culpability to determine whether, on the facts of a particular case, criminal liability on a natural and probable consequences theory should go to the jury. This judicial gatekeeping role is especially appropriate because the natural and probable consequences doctrine has its origins in the common law. (See *Prettyman*, *supra*, 14 Cal.4th at p. 260; *id.* at pp. 287–289 (conc. opn. of Brown, J.)) In this case, the trial court had the right instinct when it initially questioned whether the connection between defendants’ cultivation offense and the killing of Gabino was too attenuated to support a natural and probable consequences theory of murder. As the trial court said, “I really do think we are kind of filling some gaps by an instruction where we didn’t have actual evidence.” It is true, as the district attorney argued, that foreseeability is a question for the jury. But because the concept of foreseeability is so elastic, it is incumbent upon trial courts to determine in a given case whether exposure to natural and probable consequences liability would be “commensurate” with the defendant’s culpability. (*Chiu*, at p. 166.)

At its essence, the natural and probable consequences doctrine imposes liability on the basis of *negligence* layered on top of a defendant’s culpability for aiding and abetting a target offense. (See *Chiu*, *supra*, 59 Cal.4th at p. 164 [“ ‘Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.’ ”].) Although reasonable foreseeability can be a legitimate basis for assigning culpability, courts and commentators have long observed that the concept is susceptible to overbroad application. (See *Thing v. La Chusa*

(1989) 48 Cal.3d 644, 668 [“there are clear judicial days on which a court can foresee forever”]; *Goldberg v. Housing Authority of City of Newark* (N.J. 1962) 186 A.2d 291, 293 [“Everyone can foresee the commission of crime virtually anywhere and at any time.”]; Guthrie et al. (2001) *Inside the Judicial Mind*, 86 Cornell L.Rev. 777, 799 [“Hindsight vision is 20/20. People overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible. Psychologists call this tendency for people to overestimate the predictability of past events the ‘hindsight bias.’ ” (fns. omitted)]; Rachlinski (1998) *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L.Rev. 571, 571 [“ ‘Nothing is so easy as to be wise after the event.’ ” (fn. omitted, quoting *Cornman v. The Eastern Counties Railway Co.* (Exch. 1859) 157 Eng. Rep. 1050, 1052)].)

In light of these concerns, it is the proper role of trial courts to screen out cases in which the concept of foreseeability cannot bridge the gap between a defendant’s culpability in aiding and abetting the target offense and the culpability ordinarily required to convict on the nontarget offense. This judicial check serves to ensure that natural and probable consequences liability — a judge-made doctrine in tension with the usual mens rea requirement of the criminal law — is kept “consistent with reasonable concepts of culpability.” (*Chiu, supra*, 59 Cal.4th at p. 165; cf. 2 LaFare, *Substantive Criminal Law* (2003) § 13.3(b), p. 362; Model Pen. Code & Commentaries, com. 6(b) to § 2.06, p. 312, fn. 42.)

Because this case would enable us to provide useful guidance to the trial courts, and because defendants present a strong argument that they were convicted of second degree murder on a theory unsupported by sufficient evidence, I would grant review.